IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 186 OF 2006
With
CIVIL APPLICATION NO. 13930 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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ALPESHBHAI CHHAGANBHAI MONPARA - Appellant(s)
Versus
CHHAGANLAL BHIMJIBHAI MONPARA & ORS. - Respondent(s)

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Appearance :

Shri Amar D. Mithani for Appellant(s).
Shri B.D. Karia for Respondent(s) : 1.
None for Respondent Nos.2 and 3 (no notice was issued to them).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/12/2006

COMMON ORAL JUDGMENT

On 5th December, 2006, after hearing the learned Counsel for the appellants, this Court observed that the

plaintiff had successfully proved that he had purchased the property and raised the construction over it, the Court also observed that the Appellate Court was justified in holding that the plaintiff is the owner of the suit property. This Court also held that the plaintiff could successfully prove that the plaintiff is the owner of the suit property and has successfully proved that he had spent a good fortune in raising the construction. The Court observed that after service of the notice, the defendants appeared in the Court, but, did not file their written statement and did not even cross examine the plaintiff. This Court, after taking into consideration the totality of the circumstances, held that in view of the conduct exhibited by the defendants, the Courts below were absolutely justified in holding that the plaintiff is the owner of the property.

2. It was contended on the last occasion that the learned first Appellate Court was unjustified in presuming the plaintiff to be in possession even when the plaintiff was claiming the relief of possession. Being satisfied with this argument, this Court observed that notices be issued to the other side to show cause that why the appeal be not admitted and finally disposed of on the question proposed in the Order dated 5th December,

2006.

3. Shri B. D. Karia, learned Counsel, appears for the plaintiff-respondent and submits that the question may be framed by this Court and the same may be answered in favour of the appellants.

4. The appeal is admitted for hearing the parties on the following substantial question of law:

> *"Whether on the facts and in the circumstances of the case, the first Appellate Court was justified in presuming the plaintiff to be in possession or it should have granted a decree for possession in favour of the plaintiff?"*

5. Shri Mithani, learned Counsel for the appellants, placing reliance upon a judgement of the Apex Court in the matter of ***Shanker Popat Gaidhani vs. Hiraman Umaji More (Dead) by L.Rs. & Ors.,*** [***2003 AIR SC 1682***], submits that if the subordinate Court has not granted a particular relief in favour of the plaintiff, then, any Appellate Court cannot grant any decree what has been refused by the subordinate Court. His submission is that present is a matter which should be remanded back to the Appellate Court for modifying the operative part of the

judgement and the decree.

6. Shri Karia, learned counsel for respondent No.1, on the other hand, submits that the judgement in the matter of ***Shanker Popat Gaidhani*** (*supra*) was on altogether different facts and when he concedes that the decree for joint possession may be modified to a decree for possession only, there would be no need to remand the matter.

7. In the matter of ***Shanker Popat Gaidhani*** (*supra*), the plaintiff had filed a suit for specific performance of the contract for sale of the land, the suit was decreed, but, the decree did not contain a direction for delivery of the possession. Thereafter, an appeal was filed by the vendor, the said decree was not challenged by the decree-holder. The Appellate Court dismissed the appeal and also observed that the said decree granted by the trial Court shall be construed to be a decree directing delivery of possession. The Supreme Court observed that in a case like that, a decree for possession could not be granted in favour of the plaintiff.

8. Present is a case where the plaintiff had filed

a suit for possession, the Appellate Court held that as the plaintiff had purchased the plot and constructed the property, he would be deemed to be in possession. Present is a case where the Court has granted something more than what was asked for. In a case like the present, even applying the judgement fore-quoted, this Court should delete the part of the decree, which was not sought for, and direct that the decree be a decree for delivery of possession only.

9. So far as the question of remand of the case is concerned, when the appeal has been dismissed on merits, except on the above referred technical question, I do not think that any useful purpose would be served by remanding the matter. Assuming that I remand the matter with a direction to the lower Court to grant a decree for possession, how would the defendants-appellants be benefited. The observations made in the Order dated 5th December, 2006 and the remand order would become *res judicata* and the Second Appeal against the proposed decree would also be barred.

10. The question is answered in favour of the appellants-defendants. It is held that the Court below was not justified in holding the respondent-plaintiff to

be in possession. The Court ought to have granted the decree for possession by directing the defendants to hand over the possession within specified time and by further directing that if within the said time, the defendants or any of them does not hand over the possession to the plaintiff, the plaintiff would be entitled to execute the decree. I, accordingly, modify the decree. The Second Appeal is, accordingly, disposed of. No costs.

11. The decree shall now be a decree for possession in favour of the plaintiff. Within a period of thirty days from today, the defendants shall hand over the possession to the plaintiff and in case they fail, the plaintiff would be entitled to execute the decree. Let a decree be framed accordingly.

12. Consequently, Civil Application No.13930 of 206 stands disposed of.

[R.S.Garg, J.]

*kamlesh**